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Supreme Court of the United States

BRIEF OF RESPONDENT PUBLIC SERVICE COMPANY OF COLORADO IN OPPOSITION

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. 167

UNION RURAL ELECTRIC ASSOCIATION, INC., *Petitioner*,

v.

PUBLIC SERVICE COMPANY OF COLORADO; THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO; RALPH C. HORTON, JOHN P. THOMPSON, and JOSEPH F. NIGRO, members of said Commission; and COLORADO CENTRAL POWER COMPANY; *Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF COLORADO

BRIEF OF RESPONDENT PUBLIC SERVICE COMPANY OF COLORADO IN OPPOSITION

Without the benefit of a citation to a single decision of this Court, the petition asserts that six federal questions are presented by the holding of the Supreme Court of Colorado that petitioner, a public utility, was not entitled, as a matter of right under state law, to extend its electric facilities to serve additional customers in an area already served by two pre-existing public utilities. The basis for this holding was "a complete absence of proof that any additional service is

required or desirable." (Pet. App. p. 68a.) Moreover, "as a necessary corollary" the Supreme Court correctly ruled that the Public Utilities Commission of Colorado

> "has no authority to grant to [petitioner] any rights of extension in the area except upon application and proof of the fact that adequate service is not readily available from Public Service or Central and that public convenience and necessity requires that [petitioner] render the service requested." (Pet. App. p. 69a.)

The decision of the Supreme Court of Colorado not only correctly states the basic, universal law relating to certification of public utilities, but also is in complete conformity with the Colorado statute on the question. (C.R.S. '53, 115-4-2, Pet. App. p. 3.) On the basis of its decision, the Supreme Court of Colorado has remanded the cause for proceedings covering any future proposed extensions of facilities by petitioner in which petitioner may make application and submit "proof of the fact that adequate service" is not already available and that "public convenience and necessity require that [petitioner] render the service requested."

STATEMENT

The six elaborate questions propounded in the petition fail to survive a statement of the case, which has its origin in the fact that since long prior to 1936, the area to the immediate northeast of Denver, Colorado, has been supplied with electric service by two regulated public utilities, respondent Public Service Company (hereafter Public Service) and Colorado Central Power Company (hereafter Central). In 1938, with money borrowed from the Rural Electrification Administration, petitioner was formed for the specific

purpose of providing additional electric service in the area to "members only under a cooperative form of membership." Petitioner constructed a substation and distribution lines and actually commenced serving a few members living in the area in 1940.

During the following fifteen-year period, which coincided with the period of the area's substantial growth, petitioner continued to expand its facilities in the area served by regulated utilities and resisted each and every attempt of the Colorado Public Utilities Commission to subject it to regulation as a public utility. As a result, during this period petitioner was able to expand its electric system and furnish electrical service to its members in the area on a non-certificated, non-exclusive and non-regulated basis. (Pet. App. pp. 19a-22a) By 1955 petitioner had completed the construction of its desired electric system. In order to obtain the territorial protection for such a system that is afforded regulated public utilities, petitioner decided to change its method of operation from that of a non-regulated cooperative to a regulated public utility. Thus, in May of 1955 petitioner amended its articles of incorporation and by-laws so as to permit it thereafter to serve the public in general as well as its members. The following month petitioner initiated this proceeding by asking the Commission to disregard its fifteen-year history of denying it was a public utility and its non-utility operations, and, instead, to regard it as having been a certificated public utility since 1940. (Pet. App. p. 58a.) Its application requested a certificate of public convenience and necessity granting it a service monopoly in the entire contested area, and unlimited authority to extend at will therein in the future.

After lengthy hearings, which continued for over a year and in which Public Service and Central participated, the Colorado Public Utilities Commission on January 7, 1957 approved petitioner's application to be certificated as a public utility, effective as of that date and not as of 1940. The Commission found that the "first occasion" upon which petitioner had demonstrated the willingness and ability to serve as a public utility occurred sometime between October 17, 1955 and February 16, 1956. The Commission refused to allow petitioner to serve areas already certificated to other public utilities and ordered petitioner to remove its lines, wires and other facilities from such areas. However, the Commission allowed petitioner to continue its existing non-exclusive service and in addition the Commission permitted petitioner to extend its services in non-certificated areas already being served by Public Service.

The findings and orders of the Commission were appealed to the District Court In and For the City and County of Denver. On April 25, 1958, the position of the Commission was affirmed by the Court in all respects. The cause was then taken to the Supreme Court of Colorado and on March 14, 1960, the decision of the District Court and that of the Commission were, so far as is relevant here, affirmed except that the Supreme Court of Colorado found there was "a complete absence of proof that any additional service is required or desirable." On the basis of this finding, the Colorado Supreme Court concluded that the Commission had erred in authorizing petitioner to extend its services in the non-certificated areas without ". . . proof of the fact that adequate service is not already available from Public Service or Central and

the public convenience and necessity requires that [petitioner] render the service requested."

The Colorado Supreme Court also noted that it followed as "a necessary corollary" that Public Service and Central be permitted to extend their facilities to serve future customers in the area in conformity with the Colorado statute involved. According to the Court:

> "Public Service and Central having served *the area* long prior to [petitioner's] incorporation have at great expense acquired valuable rights to serve the area, all in conformity with law and with the approval of PUC, and PUC cannot deprive them of their rights to extend and expand their services in the area so long as such expansion does not impair or endanger service to others or other areas entitled to their service." (Pet. App. p. 68a.).

In order that petitioner may have the opportunity to show that additional service is required for which adequate service is not available, the cause has been remanded to the Colorado Public Utilities Commission.

The above modification made by the Supreme Court of Colorado is the sum and substance of the six allegedly federal questions raised by petitioner. Despite petitioner's admission that the Supreme Court of Colorado did precisely that which it had been asked to do by respondent Public Service in its brief and argument (Pet. App. p. 12), the first suggestion that the modification might raise federal questions was made in a petition for rehearing that was summarily denied by the Supreme Court of Colorado on April 11, 1960.

REASONS FOR DENYING THE WRIT

The petition presents no reason for granting the writ. As petitioner itself concedes (Pet. p. 11), it would "limit its characterizing of the decision below to the accepted word 'erroneous' had not [the dissent] adopted more forceful descriptions. . . ." Although the petition is replete with "forceful descriptions," it presents no federal question; no federal question was properly raised or framed below; and the decision below is not final.

(1) Petitioner's basic complaint is that because it has been certificated as a regulated public utility, as of 1957, it is constitutionally entitled to be treated as if it had been so certificated as of 1940. Petitioner with newly achieved status of a public utility wishes to be regarded as having the same history, investment and function in the area as have Public Service and Central. However, all three state tribunals found the undisputed evidence to be that not only was petitioner completely different from Central and Public Service, but the difference was of petitioner's own choice and making. What petitioner ignores is that the recognition of reasonable differences is a necessary corollary of and not a denial of equal protection. *Brown-Forman Co.* v. *Kentucky*, 217 U.S. 563. *Rast* v. *Van Deman & Lewis Co.*, 240 U.S. 342.

By a parity of reasoning, petitioner's argument that it has been denied due process also fails. The classification between public utilities on the basis of history, investment, function and policy being a justifiable one, surely it is within the power of the state to make such a classification and act upon it. The state may, therefore, require petitioner to eat its newly acquired cake and establish the facts necessary to en-

title it to a certificate of public convenience and necessity to make future extensions in an area already served. Indeed, if, as petitioner contends, every public utility had an absolute right to expand its services to an area already served by existing utilities regardless of public convenience and necessity, the purpose of public utilities regulation would be nullified." Perhaps because of its youth as a utility, petitioner has yet to learn that public utilities have been subjected to the police power and the laws of the respective states within which they operate with the approval of this Court for well over 100 years, and that all constitutional questions relating to the power of the states to regulate have been resolved in favor of regulation so consistently as no longer to raise any question. *Munn* v. *Illinois*, 94 U.S. 113, *Union Dry Goods Co.* v. *Georgia Public Service Corporation*, 248 U.S. 372.

Petitioner complains that the effect of the decision of the Colorado Supreme Court is to force it out of business. This is not true. The decision below granted petitioner a certificate of public convenience and necessity to continue its existing business. The only restriction imposed by the Supreme Court of Colorado is on petitioner's right to construct future extensions of electric facilities. The power so to restrict extensions and construction of facilities by public utilities has long been a valid and incidental part of the power to regulate. *People of the State of New York* v. *McCall*, 245 U.S. 345.

(2) The questions presented in the petition were first raised below in a petition for rehearing that was summarily denied. Such questions come too late for consideration here. *Radio Station WOW* v. *Johnson*,

LEGEND

This MAP illustrates the Application for a Writ of Certiorari filed by Union Rural Electric Association, Inc., with the Supreme Court of the United States.

It is not a copy of any one Exhibit in the Record.

It is a composite of Exhibits Nos. 24, 26, and V-1 of the Record, and contains most of the data on those Exhibits in a combined form. However, no transmission lines are shown.

The STIPPLED areas constitute the Appendix A Territory to which the orders and judgments have applied.

——— The RED lines are the 1955 electric distribution lines of Union Rural Electric Association, Inc. [Ex. V-1].

——— The GREEN lines are the 1955 electric distribution lines of Public Service Company of Colorado, [Ex. 26]. The broken or dotted green lines show those lines of Public Service Company in 1955 most recently constructed, [Ex. 24]. Solid green areas show some of the municipalities served by Public Service Company.

——— The PURPLE lines are the 1955 electric distribution lines of Colorado Central Power Company, [Ex. V-1]. The solid purple areas show municipalities served by Colorado Central.

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326 U.S. 120; *Herndon* v. *Georgia*, 295 U.S. 441. The only exception to this rule arises when the decision of the highest court may be said to have come as such a surprise that a federal question could not have been foreseen prior to the decision. Petitioner may make no claim of surprise here. Petitioner concedes that respondent Public Service asked the Supreme Court of Colorado to make the very modification of which federal complaint is now made.[1] In petitioner's own words,

> "[T]he basic claim by Public Service upon which its review was sought was that the PUC had granted to [petitioner] a certificate to serve electrical energy in areas where Public Service had established rights through certificates and long establishment of lines, all without any showing to the PUC that the grant of the certificate would serve the public convenience and necessity." (Pet. 12)

In view of the fact that the court below merely agreed with the written and oral arguments presented by Public Service, the only surprise to petitioner was that usually experienced by a litigant when its opponent's views prevail. Refusal to allow petitioner to extend its facilities in areas already served was not only foreseeable, it was a necessary corollary to the findings which were made by the Commission that the area in question was already being served by two long-established public utilities, and that there was a complete absence of proof of need for any additional service. Moreover, no federal question was properly framed below. In its petition for rehearing, petitioner was content to do no more than characterize the decision of

[1] Pages 91-99 of the opening brief and pages 52-64 of the reply brief filed by Public Service in the Supreme Court of Colorado.

the Supreme Court of Colorado as being "without due process of law," "contrary to the state and federal constitution," "a denial of due process," and "contrary to the provisions of the constitutions of Colorado and the United States." Such general broadsides are not sufficient to frame a federal question. *Herndon* v. *Georgia, supra; Bowe* v. *Scott*, 233 U.S. 658.[2]

(3) The decision of the Colorado Supreme Court lacks the finality requisite to review by this court. Although the right of petitioner to continue its present operations was affirmed, the cause has been remanded to the Colorado Commission for the purpose of determining if public convenience and necessity justifies *future extensions* by petitioner as the need arises. Until this is done, the decision below cannot be regarded as final.

[2] There is no possible ambiguity in the record on this point. Thus, the jurisdictional defect is not cured by the certificate of existence and decisions of a federal question executed by the presiding justice of the Supreme Court of Colorado. In addition, it may be noted that the description of the purported federal questions contained in the certificate is even more vague, uncertain and subject to conjecture than the description set forth in the petition for rehearing itself.